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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 603

JOSEPH SANTOS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. .....

JOSEPH SANTOS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Joseph Santos prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case affirming the petitioner's convictions under 18 U.S.C. § 2 and 21 U.S.C. Section 176 (a) for smuggling and conspiring to smuggle marihuana.

Opinion of the Courts Below

An indictment was returned against Joseph Santos and two others by the Grand Jury for the United States District Court, Southern District of California, which indictment was filed on July 21, 1965. Count one charged the petitioner and diverse persons, to the Grand Jury unknown, conspired to smuggle marihuana into the United States and in furtherance thereof, one overt act was committed. *To wit,* on May 7, 1965 one Pedro Meza-Bustamonte entered

the United States from Mexico in an automobile containing approximately ninety-five pounds of marihuana. Count two charged the Petitioner with aiding and abetting in the commission of the offense.

A jury trial of petitioner commenced on November 16, 1965 and on November 19, 1965 he was found guilty as charged on both counts. Thereafter, on January 10th the petitioner was sentenced to twenty years in prison upon each count, the terms to run concurrently. The opinion of the Court of Appeals affirming the petitioner's conviction and the denial of the Petitioner's petition for rehearing are printed hereto, *infra*. A certified typewritten transcript of the record in the United States District Court for the Southern District of California was sent to the clerk of the Supreme Court of the United States by the Clerk of the United States Court of Appeals for the Ninth circuit on August 17, 1967.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was dated and entered July 17, 1967. Petition for rehearing was denied August 14, 1967. The Jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1), and Rule 22 (2) of the Rules of the Supreme Court of the United States.

Questions Presented

1. Was it error for trial court to refuse to compel disclosure of an individual who might have been in possession of exculpatory evidence.

2. Was Petitioner denied his Sixth Amendment right to counsel by the admission of inculpatory statements obtained by a Custom's Agent who was fully aware of Petitioner's indictment and retention of a California Attorney.

3. Did the prosecution fail to satisfy its burden of establishing the corpus delecti of conspiracy or the Petitioner's participation therein.

Statutes Involved

Title 18 U.S.C. 2.

Section 2 Principals.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly preformed by him would be an offense against the United States, is also a principal and punishable as such.

Title 21 U.S.C. 176a.

Section 176a Smuggling of marihuana; penalties; evidence; definition of marihuana.

Notwithstanding any other provision of law, whoever, knowingly with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

Statement of the Case

On May 7, 1965, at approximately 5:40 P.M. one Pedro Meza-Bustamonte, the driver and sole occupant of a 1955 Chrysler automobile, entered the United States from Mexico at San Ysidro, California. At the entry point Customs Inspector, Lloyd Hanson, searched the car and discovered ninety-five pounds of a substance, later identified as marihuana, secreted under the front fender and right rear door of the vehicle. Hanson initially claimed that the search was prompted by Meza-Bustamonte's (hereinafter referred to as Meza) unusual nervousness. However, it later was revealed that the search was made pursuant to information revealed to customs by an informer.

A green piece of paper bearing the handwritten figure "666 98 48 Elisa" was found in Meza's watch pocket. In addition, on the back of a sales slip, allegedly taken from Meza's billfold, the following printing appeared:

"Hailanderl Motel, Hailand Ave.—126"

At approximately 6:10 P.M., some thirty minutes after Meza's entry, Joseph Santos (hereinafter referred to as Petitioner), the driver and sole occupant of a 1965 Impala automobile, entered the United States at San Ysidro.

Petitioner was also stopped and searched. As in the case of Meza, the search of Petitioner's automobile was initially sought to be justified because of Petitioner's unusual nervousness. It was later established, however, that the same information which prompted the stop and search of Meza's automobile, was also the source of this second search.

A search of Petitioner's vehicle revealed, beneath the front seat floor mat, a license plate receipt in the name of Joseph Santos. The receipt was for a 1963 Cadillac automobile, with New York license place number "212-JS", representing a transfer of ownership to one Patricio Becerra.

A search of the Petitioner revealed a Highlander Motel key, number 126. The address of the motel was 2051 N. Hailand Avenue, Hollywood, California. Petitioner was found to have an Econo-Car business card with the number "DU 6-2322" imprinted on it, as well as an installment promissory note.

After Meza and Petitioner were taken into custody, they were confronted with each other and both denied ever having seen, or even having had any contact with the other.

Over defense objections Agent Gates was permitted to testify that after Petitioners apprehension, he was interviewed and in substance related that he and his employee Miguel Lamenca had come to the west coast to go to Tijuana to retrieve the license plate of a 1963 Cadillac automobile sold, in New Cork City, to a Mexican citizen.

Gates further related that after telling Petitioner a telephone number which was identical with the one written on the back of the card in Petitioner's possession, and a slip of paper which contained the name and address of the same motel for which Petitioner possessed a key had been found on Meza, Petitioner allegedly said: "The damage is done."

Supervisory Customs Port Investigator, Robert L. Rainsberger visited the Highlander Motel on the night of May 7, 1965. Miguel Lamenca was found living in Room 126. He had $4500 in his possession. Mr. Lamenca explained that he was holding the money in safekeeping for Petitioner. Lamenca was not arrested. However, $4000 was confiscated with the remaining $500 being given to Lamenca for his return to New York.

On May 18, 1965 Agent Finbar J. Murphy interviewed Petitioner in New York City. Agent Murphy testified that Petitioner informed him that on March 22, 1965 he sold his 1963 Cadillac automobile for $4000 to a Mexican male. Petitioner further stated that after the sale the Mexican drove off with the car to Tijuana with the New York plates still affixed to the vehicle Agent Murphy related out of the hearing of the jury that he knew that Santos had retained a San Diego attorney.

On March 21, 1967, the 1963 Cadillac with New York License 212-JS was stopped 23 miles east of Grants, New Mexico, by New Mexico State Police Patrolman Benavidez. It was driven by one "Iglesias". Miguel Lamenca was a passenger. "Iglesias" told Benavidez that he was assisting Lamenca with the driving. Lamenca stated that he was driving the vehicle to California to sell it for the owner, Joseph Santos, who was his employer in New York. They had no title registration or a power of attorney. Two phone calls by the officer to Petitioner, confirmed ownership and purpose of cars presence in New Mexico.

A. The voir dire on the informant's identity

After Meza terminated testifying on his own behalf, the question of the identity of the informant was taken up out of the jury's presence. In the interest of time, government's attorney Johnson waived any hearsay objection as to Agent Gates stating what information he had received, but he did not waive the objection to the question that would reveal the informant's identity.

Agent Gates testified that information was received which resulted in the stopping the two vehicles. He testified that a "look-out" was put at the boarder in order to stop both cars. Gates related that he received information that the 1955 Chrysler had driven into a garage owned by Patricio Becerra in Tijuana. Gates received information that Patricio was seen to enter the garage with several "gunny-sacks" in his possession and the garage door was closed. Several other people of Latin extraction were in the garage. Information was also received that two men arrived at the garage in a white Chevrolet automobile bearing license number PGB 125; that the garage door was opened and that, that vehicle was taken inside. The Chevrolet remained inside for five minutes, it was removed and replaced by the Chrysler. The information received also indicated that after the Chevrolet was removed, it was driven and parked on the street, and the people in the Chevrolet remained in the area.

Petitioner, through counsel requested that the identity of the informant be made known. The Court refused to order disclosure of the informant.

The court stated it would not require the government to identify the informant unless Petitioner took the stand and showed that such disclosure would assist him in the preparation of a defense. The court reiterated that it would not grant the defense request unless Petitioner took the stand.

Under protest Petitioner was called to testify outside the presence of the jury. He related that on May 7, he had talked with Patricio Becerra in connection with the sale and registration of a car. He talked to Becerra outside a residence which was apparently unoccupied. All during the conversation his vehicle was parked on the street. Santos stated that he never saw a garage at the premises. He described the building as a house with and an iron fence around it. A welding truck, a Plymouth and an Oldsmobile were parked nearby.

Petitioner also stated that he received $4000 in New York when he sold the Cadillac to a man he thought to be Patricio Becerra. Petitioner stated that when the auto was sold it was agreed Lamenca would drive it west and upon arrival in Los Angeles, the purchaser would re-register the car and give Lamenca the plates so that they could be returned to Petitioner. It was agreed that if the purchases could not register the car, the money would be refunded. The principal purpose of the trip and the talk with Becerra was to straighten out the registration. The court refused to order disclosure.

B. Motion for mistrial

After the question of the informant had been argued and determined outside the presence of the jury, Agent Hanson was called to testify as a rebittal witness before the jury. Previously he testified that the reason he searched Meza's Chrysler was because he had acted unusually nervous. Hanson testified, on rebuttal, that at 7:00 P.M. on the day in question he was unaware that Santos had been arrested. Counsel for Petitioner then asked "in other words, you didn't have any knowledge of any purported connection between the two " Hanson answered "No Sir, excepting for the search report—or the look out." A motion to strike the answer was granted, but a motion for mistrial on the grounds that the witness had deliberately gone into the question of the "look-out" was denied.

Reasons for Granting the Writ

A. The trial Court's refusal to compel disclosure of the Informant

It must be noted at the outset that the request for the informant's identity was made at a trial to determine the guilt or innocence of Petitioner. In the exercise of its supervisory role over the administration of justice in the federal system this Court has held that where "the dis-

closure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro* v. *United States*, 353 U.S. 53 at 60-61 (1956).

Whatever the propriety and continuing vitality of *McCray* v. *Illinois*, 386 U.S. 300 (1967), when the guilt or innocence of a criminal accused is at stake the privilege of not disclosing an informer's identity stands on a different footing. The request for the informant's identity in the instant case was not a meaningless formality. The Court of Appeals for the Ninth Circuit recognized that the informer may have been able to establish the innocence of Meza who was one of the co-defendants. (A-2) Meza was indicted as a principal under 18 U.S.C. § 2 and if his conviction would fall then Petitioner's conviction as an aider or abettor would likewise fall.

The informant was an eyewitness to the loading of the vehicle and had also observed several of the unknown persons with whom defendant is charged with conspiring to smuggle marihuana into the United States. It is not clear whether the informer was merely an observer of the loading or was an actual participant. If the informer was placed on the stand he could be called on to reveal whether defendant was present while the marihuana was being loaded.

If the informant was a participant in the crime, itself, then he would be in a position to establish the innocence of Petitioner.

The Government is in a position to identify a person whose knowledge may establish the innocence of Petitioner. To deny Petitioner's request to have this witness available to testify, impairs the integrity of the fact-finding process. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The problem of informers who accuse and remain silent is a grave threat to a free society. *McCray* permits the police to arrest a suspect on the word of a person who

may or may not exist and threatens the liberty of innocent citizens. An extension of *McCray* into the guilt-determining process may result in the conviction of an innocent man. In the instant case this was directly accomplished by the trial judge's refusal to permit disclosure.

In addition, the prejudice resulting from non-disclosure was compounded, when a Custom's Agent testified as to the placing of a look-out at the border charged with the duty of spotting the cars. Such testimony purports to criminally connect Petitioner and Meza so closely together as to make an acquital of the conspiracy count highly improbable. Therefore, the Petitioner was saddled with the additional burden of having the jury believe that the government had prior knowledge of some criminal partnership between Petitioner and Meza.

The Petitioner respectfully urges this Court to consider the question of informers and their disclosure, in order to preserve the integrity of the fact-finding process in the federal system.

B. The admission of Petitioner's inculpatory statements

This question concerns the continuing vitality of *Massiah* v. *United States,* 377 U.S. 201 (1964). *Massiah* clearly stands for the proposition that surreptitious questioning after indictment, will operate to exclude any incriminating statements obtained as a result of such questioning.

In the instant case Petitioner was approached by a Custom's Agent who knew that Petitioner had been indicted and was represented by a California attorney. The agent claimed that his purpose in seeing Petitioner was to speak with him concerning a registration slip for a Volkswagon seized for forfeiture. The Custom's Agent alleged that Petitioner "voluntarily" commenced speaking about the Cadillac automobile and further alleged that the Petitioner was informed of his constitutional rights.

We are thus confronted with two questions. First, whether after indictment a criminal defendant may be questioned without counsel present, or without counsel's permission for such questioning. Second, whether the accused, after indictment, can waive his rights and, if so, what type of warning is necessary to permit an intelligent waiver.

After an indictment has been returned the adversary phase of the criminal prosecution has been reached. *Massiah* v. *United States, supra* (1964). See also *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). Thus, after an indictment, any questioning is a critical stage in the prosecution against the accused, and an intelligent decision to speak can only be made after consultation with one's lawyer.

The required warnings of *Miranda* v. *Arizona,* 378 U.S. 436 (1966) were established in the context of pre-indictment interrogation and the privilege against self-incrimination. In *Miranda* there was not a single citation to *Massiah* which was based solely on the Sixth Amendment's right to counsel. See Graham, *What Is "Custodial Interrogation"?: California's Anticipatory Application of Miranda* v. *Arizona,* 14 U.C.L.A.L. Rev. 59, 75 (1966).

In attempting to question Petitioner after his indictment, in hope of obtaining inculpatory statement, the Custom's Agent, at the time certainly "[became] in a very real sense, [Petitioner's] adversary allied with the prosecution in an effort to support the charge already laid against him." *People* v. *Bodie,* 16 N.Y. 2d 275, at 281, 213 N.E. 2d 441 at 444, 266 N.Y.S. 2d 104, at 109 (1965) (dissenting opinion per Fuld, J.).

When a suspect is questioned after arrest, such interrogation may be for the purposes of determining whether to charge him with a crime. Once the judicial stage is reached, the only purpose of interrogation is to obtain in-

criminating statements. In effect, the adversary proceeding has commenced and:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him of the law. AMERICAN BAR ASSOCIATION'S CANONS OF PROFESSIONAL ETHICS No. 9. Quoted with approval in Escobedo v. Illinois, 378 U.S. 478, 488n. 7 1964).

Petitioner was not informed of his right to remain silent and the claim of the Agent that he had come to speak with Petitioner concerning another automobile is extremely questionable. This latter point is well illustrated by the Agent's admission at trial that he "couldn't get any more details out of him as to why a man from Tijuana would come all the way . . ." (R. T., p. 134). To find a waiver of the right to counsel under such circumstances is certainly to relax the high standards for waiver established by this Court. See *Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

In any event, the instant case presents an excellent opportunity for the Court to fully consider the right to counsel rationale of *Massiah* as compared to the privilege against self-incrimination rationale of *Miranda.* Can a suspect be subject to police interrogation after an indictment has been returned against him? Does *Massiah* retain vitality as a decision protecting rights which exist separate and distinct from those of *Miranda?* This is the question which makes this case "ripe" for a grant of certiorari.

C. The evidence is insufficient as a matter of law to sustain the conviction of the Petitioner

Evidence presented to the trier of the fact clearly indicates that excluding all inadmissible facts and statements the Government has only been able to prove the following:

A vehicle driven by one Meza entered the United States on May 7th, 1967, at about 5:40 P.M. A subsequent search revealed that ninety-five pounds of marihuana were secreted in the car. Allegedly there was found a piece of paper listing the name and room number of a motel in Los Angeles, California.

About a half hour later, the Petitioner Santos was stopped crossing the border at San Ysidro. Petitioner had in his possession the key to the above indicated motel room.

Other than the above, there is nothing of substance upon which the triers of face could have determined the petitioner's guilt beyond a reasonable doubt. The evidence is not even strong enough to establish a case of guilt by association and guilt by motel room number is certainly not the law.

In *Ong Way Jong* v. *United States,* 245 F.2d 392 (9th Cir. 1957) the court clearly stated that guilt by association was not sufficient to support a conviction. In substance, there is no evidence that the petitioner knew of the conspiracy or in any way participated therein. *United States* v. *Falcone,* 311 U.S. 205, 210 (1940). See also *Plazola* v. *United States,* 291 F.2d 56 (9th Cir., 1961); *Sandez* v. *United States,* 239 F.2d 239 (9th Cir., 1956); *Taylor* v. *United States,* 260 F.2d 737 (D.C. Cir., 1958).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY ROTHBLATT
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Attorneys for Petitioners

ROBERT M. PITLER
On the Brief

APPENDIX

APPENDIX 1

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,044
21,045
21,046

MIGUEL LAMENCA, JOSEPH SANTOS and PEDRO MEZA-BUSTAMONTE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

[July 17, 1967]

Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: JERTBERG, BROWNING, and ELY, Circuit Judges

PER CURIAM:

These are appeals from convictions under 21 U.S.C. § 5176(a) [sic] (1964) for smuggling and conspiring to smuggle marihuana. We find no error.

The government's circumstantial evidence, combined with appellant's false statements to government agents, made a sufficient case for the jury.

Escobedo v. *Illinois,* 378 U.S. 478 (1964), did not bar admission of appellants' statement to government agents since none of the appellants requested counsel (*Manning*

v. *California*, ... F.2d ....., (9th Cir. May 15, 1967), and, in any event, there was ample basis for a finding of waiver.

The trial court's refusal to force disclosure of the government's informer was not error. The customs inspectors who searched the 1955 Chrysler automobile driven by Meza-Busamonte acknowledged that they had been "tipped off" by an informer who claimed to have seen a 1955 Chrysler taken into the garage of a known Tijuana narcotics vendor. The informer also noted the presence at the scene of a late model Chevrolet, the descriptions and California license number of which matched that of the car driven by Santos when he was arrested at the San Ysidro Port of Entry some thirty minutes later. Thus it was clear that the informer was merely an observer of the events described, and that he did not participate in the loading or driving of the automobile. Conceivably the informer might have aided the defense of Meza-Bustamonte, who testified that he had been duped into driving the car across the border by two persons whose names he did not know, that he had not participated in placing the marihuana in the car and was unaware of its presence (*but see Ruiz* v. *United States*, ... F.2d ..... (9th Cir., June 20, 1967)); but Meza-Bustamonte did not join in the request for disclosure. Lamenca and Santos made no adequate showing that knowledge of the informer's identity would have aided their defense. On the other hand, the government advised the court that the informer's reports on known Tijuana narcotics dealers had been of great value, and the government believed the informer would be "done away with" if his identity became known to the Tijuana narcotics vendor in whose garage the car had been loaded. See *Ruiz* v. *United States, supra*, and cases cited therein.

The remaining spcifications of error are also without merit.

Affirmed.

APPENDIX 2

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21045

JOSEPH SANTOS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL from the United States District for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 17, 1967.

APPENDIX 3

Order of the Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, August 2, 1967

Before: JERTBERG, BROWNING and ELY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of, the Court, IT IS ORDERED that the petition of appellants filed August 2, 1967, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX 4

Notice by Clerk of Court of Appeals of Denial of Petition for Rehearing

OFFICE OF THE CLERK

U. S. COURT OF APPEALS

P. O. Box 547

San Francisco, Calif. 94101

Aug. 14, 1967

Messrs. Sheela, O'Laughlin & Hughes
Attorneys at Law
U.S. Grant Hotel
San Diego, Calif.

Dear Sir:

The Petition for aRehearing heretofore filed in case No. 21044-46—Miguel Lamenca v. USA, was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days;
Criminal cases, 30 days.

Sincerely,

WM. B. LUCK,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 603

JOSEPH SANTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1967 (Pet. App. 2). A petition for rehearing was denied on August 14, 1967 (Pet. Apps. 3 and 4). The petition for a writ of certiorari was filed on September 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to require the government to divulge the identity of an

278-889—67

informant, where there was no showing that the informant's testimony would be materially helpful to the defense at trial and where the government's refusal to disclose the informant's identity was essentially based upon its belief that to do so would place his life in jeopardy.

2. Whether statements volunteered by petitioner to a government agent, after being fully apprised of his right to counsel and to remain silent, were properly admitted into evidence.

3. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to smuggle marihuana into the United States and of aiding and abetting the substantive offense. Jointly tried and convicted with him were co-defendants Lamenca and Meza-Bustamonte. Petitioner received concurrent sentences of twenty years' imprisonment on each count (1 R. 2–4, 28). The court of appeals affirmed *per curiam* (Pet. App. 1).

1. At the trial, federal customs agent Gates testified that on May 7, 1965, an informant, who frequently reported on narcotic dealers operating in Tijuana, Mexico, advised Customs authorities that on the late afternoon of that day he had seen a 1955 Chrysler drive to the home of Patricio Becerra, a known narcotics dealer in the Tijuana area. He observed Becerra enter his garage carrying several

gunnysacks. Shortly thereafter, two unidentified men arrived in a Chevrolet Impala, California license PCB125, and drove into the garage. About five minutes later the Chevrolet was removed from the garage and the Chrysler driven in (Tr. 303–304). On that same afternoon, soon after the informant reported what he had seen, the two automobiles appeared at the port of entry at San Ysidro, California. Primarily because of the informant's tip, the automobiles and their occupants were searched. Concealed in the 1955 Chrysler, which was driven by co-defendant Bustamonte and which arrived at the border first (4 R. 48), the agents found approximately 95 pounds of marihuana. The wholesale value of this marihuana in Mexico was about $1,425 (4 R. 49–51, 70). In Bustamonte's billfold was a sales slip in Spanish with the purchaser listed as "Patricio Becerra", and written on the reverse side was the notation: "Hailanderl Motel 126 Hailand Ave. 126" (4 R. 56–57). A piece of paper in Bustamonte's pocket bore the number "6 2312" (4 R. 52–53).

In the Chevrolet, which was being driven by petitioner and arrived at the port of entry about thirty minutes after the Chrysler (4 R. 59), the agents found a license plate receipt showing the transfer of a 1963 Cadillac, New York license number 212–JS, from Joseph Santos to Patricio Becerra (4 R. 60, 64–65). Among petitioner's personal possessions the officers found a key to room 126 of the Hailanderl Motel (4 R. 71) and a business card for a car rental agency on the back of which was written "DU6–2312" (*ibid.*). ("DU" were the first two letters of a Tijuana

telephone exchange (4 R. 75).) Also found on petitioner's person was a promissory note for the purchase of the 1963 Cadillac, dated December 20, 1962 (4 R. 72).

2. After the search, petitioner was taken into custody and questioned. The customs agent told him that he did not have to talk, that anything he said could be used against him, and that he was entitled to the services of an attorney. Petitioner said that he left New York on May 6 and came alone, via United Air Lines, to the west coast; that he rented a car in Los Angeles and went to a motel; that the following day he drove alone to Tijuana; and that the number 6–3212 was that of a girl in Tijuana (4 R. 72–74). When the agent told him that they were aware that a Mr. Lamenca had checked in with him in Los Angeles, petitioner said that Lamenca, a former employee, had come with him on the flight from New York. He also said that he had been accompanied to Tijuana by Lamenca, that he stayed there, and that he did not have a key to their Hollywood motel room (4 R. 74).

The agent then told petitioner that Bustamonte had in his possession a notation of the same number that petitioner had—6–2312. Petitioner was further apprised of the fact that Bustamonte had a slip of paper that had written on it, "Highlander Motel, 126, Highland Avenue." In response petitioner said, "The damage is done now." He then stated that he had sold a 1963 Cadillac to a Mexican who had been introduced to him by Lamenca and that the real purpose of his trip was to recover the license plates which were still on the car (4 R. 74–75).

Some eleven days later, on May 18, 1965, while petitioner was at liberty in New York City, another customs agent went to petitioner's place of business to interview him about the registration of a Volkswagen which was under seizure. After the agent had obtained some information on that matter and was about to leave, petitioner followed him to the door and started telling him about the Cadillac. The agent asked him if he had a lawyer in New York, and petitioner replied that he did not, because he did not think that it was necessary. The agent told him that he should get a lawyer in New York. When petitioner continued to talk about the Cadillac the agent warned him that anything he said could be used against him. Petitioner replied that he wanted to straighten this thing out; that on March 22, 1965, he sold a 1963 Cadillac to a resident of Tijuana, Mexico, who had driven off with the New York State license tags still on the car (4 R. 10–12, 108–109).[1]

[1] The facts on the Cadillac transaction, as they were developed by the government at trial, were that on March 21, 1965 (the day before the sale of the Cadillac was supposed to have taken place in New York), a 1963 green Cadillac convertible traveling west on Highway 66 was stopped for a routine check by a New Mexico state highway patrolman. The passenger in the car, co-defendant Lamenca, said that he and the driver were on their way to California to sell it for petitioner. He had no title papers, no power of attorney to sell, and no "caravan license," as required by New Mexico law. The patrolman placed a collect call to petitioner in New York, who denied knowing anything about a 1963 Cadillac (Tr. 141–146). Lamenca then told the patrolman that petitioner was going to come to California with a girl friend, which was the reason for the story about the resale. On a second call, petitioner told the patrolman that there was no girl friend and that the reason the car was being transported to California was to sell it (5 R. 146–147).

3. The government refused to disclose the name of the informant who had provided the information about the automobiles because, as it advised the trial court outside of the presence of the jury, to do so would have placed his life in jeopardy. After a preliminary ruling that divulgence was not required (3 R. 298–303), the court stated that if defense counsel wished to, he could place petitioner on the stand "so that we can determine whether or not the informant might assist in the defense" (Tr. 305). Counsel then called petitioner to the stand. In the absence of the jury, he testified that he went to a house at the outskirts of Tijuana to see Becerra about the registration of the car, but that he saw no 1955 Chrysler and no garage. In response to the court's questioning, petitioner testified further that he had sold a Cadillac in New York City to a nephew of Becerra; that he had given Becerra half of the bill of sale; and that co-defendant Lamenca was to take the car to Los Angeles and bring back the license plates. If Becerra could not register the car in his name, Lamenca was to bring the car back to New York and petitioner promised to refund the purchase price (3 R. 318–319).

The court characterized this account as an "unbelievable story" and stated that it was not going to cause a dismissal of the case because of the government's refusal to disclose the name of the informant (3 R. 319–329).

ARGUMENT

1. As this Court has stressed, there is no fixed rule to determine when the identity of an informant must be divulged for the purpose of assisting the defense.

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro* v. *United States,* 353 U.S. 53, 62; *Rugendorf* v. *United States,* 376 U.S. 528, 534–535; *McCray* v. *Illinois,* 386 U.S. 300, 310–311. These principles were correctly applied in the instant case.

The particular circumstances showed that the informant took no part in any transactions at the garage but merely reported to the Customs authorities what he had witnessed at that location. Nor did his information link petitioner to what he had seen—in fact, he identified none of the individuals involved at the garage, except for Becerra, the known narcotics trafficker. Moreover, although petitioner was afforded a full opportunity to do so by the trial judge, he did not establish how the informant's testimony could have been truly relevant or helpful at trial. Indeed, whatever the informant might have testified to concerning what he had seen, the basic evidence establishing petitioner's guilt—*i.e.,* the items seized on the search of the two automobiles and petitioner's several false versions of his conduct given to the agents—would remain unshaken. On the other hand, the government's refusal to divulge was based on the significant concern that revealing its source might hinder the government's general investigation into the narcotics traf-

fic from Tijuana and might well place the informant's life in jeopardy. In short, the trial judge was wholly justified in striking the "proper balance" in this case by ruling against disclosure.[2]

2. There is no substance to petitioner's contention that the statements he volunteered to a government agent during the May 18, 1965, interview in New York were inadmissible under *Massiah* v. *United States,* 377 U.S. 201. Despite petitioner's assertion to the contrary (Pet. 10), the interview occurred over two months before the return of the indictment on July 21, 1965, and therefore the Sixth Amendment rule of *Massiah* has no application in this case.[3] Moreover, unlike the situation in *Massiah,* petitioner was not the victim of a surreptitious surveillance arranged by government agents for the purpose of securing incriminating admissions for use against him at trial. On the contrary, petitioner made his May 18 statements on his own

[2] Although the court of appeals fully agreed that petitioner's rights were not violated by the handling of the disclosure issue, the court did note that "conceivably" the informant's testimony might have aided the case of co-defendant Bustamonte because of his trial claim that he had been duped into driving the Chrysler across the border and had not participated in secreting the marihuana in the car (Pet. App. p. 2a). However, there was nothing in the information conveyed by the informant that tended to identify Bustamonte with what was seen at the Becerra garage. His involvement in the scheme was established by his driving the vehicle, transporting the marihuana, and possessing incriminating documents.

[3] As this Court stated it, *Massiah* held that a defendant is denied his Sixth Amendment guarantees "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him *after he had been indicted* and in the absence of his counsel" (377 U.S. at 206; emphasis added).

initiative, at his own office, with full knowledge that he was talking to a government agent, and after being advised to secure counsel and warned of his right to remain silent.[4]

3. Petitioner's final point is similarly without substance. There is no occasion for this Court to review the sufficiency of the evidence. As the record shows (see Statement, *supra* pp. 2–6), and as the court of appeals found (Pet. App. 1), the evidence of petitioner's obvious connection with the scheme to smuggle marihuana into this country, "combined with [petitioner's] false statements to government agents, made a sufficient case for the jury." See *Glasser* v. *United States*, 315 U.S. 60.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Petitioner's reliance upon the American Bar Association admonition that an attorney should not talk to an opposing party litigant outside of the presence of his counsel (Canon 9) is equally misplaced. Apart from the fact that this rule is not of constitutional dimension, it would, in any event, be inapposite here "because it deals with the conduct of lawyers and not with the conduct of investigators" *Massiah* v. *United States*, *supra*, 377 U.S. at 210–211 (dissenting opinion).

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